No. 3073

In the United States Circuit Court of Appeals

for the Ninth Circuit

CHARLES P. DOE, Claimant of the Steamship "GEORGE W. ELDER," Her Engines, etc.

Appellant

vs.

COLUMBIA CONTRACT COMPANY, a Corporation, and UNITED STATES FIDELITY AND GUARANTY COMPANY, Stipulators

Appellees

Petition for a Rehearing

SANDERSON REED
PROCTOR FOR THE PETITIONER

SCHWAB PRINTING COMPANY

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To the Honorable Wm. B. Gilbert, Wm. W. Morrow, Wm. H. Hunt, Judges of the above entitled court:

The appellant, on reading the opinion of this honorable court, prays for a rehearing, the grounds being specifically stated in this petition, but also generally on the ground that there seems yet to exist in the mind of the court a conception of the issues of fact and the law applicable thereto, misleading the court in the rendering of the decision.

On reading the opinion of this honorable court it would appear therefrom that the contention of

the appellant has been sustained, and yet the decree rendered in favor of the respondent.

The opinion herein up to a certain point reads as follows, to-wit:

> "Gilbert, Circuit Judge, after stating the case:
>
> It seems clear that the Kern was at fault in the first instance in not signaling her consent to the first passing signal of the Elder. The Kern and her tow lay in the channel way and at least 1,000 feet from the Washington shore. There was ample room for the Elder to pass to starboard without danger to the Kern or her tow. The only reason which Moran, the pilot of the Kern, assigned for answering with the danger signal was that the Elder was headed directly for him, and that there was going to be a collision, and that he could see no evidence that the Elder had started to turn to starboard. He did not think that it was unsafe for her to come farther on her course. Moran, it appeared, was laboring under a misapprehension of the rule, and he thought that the law required the Elder to accompany her whistle by an alteration of her helm, so that the Kern could see what she was doing. The fault of the Kern was a grave one. But for her pilot's refusal to assent to the passing signal, the Elder would undoubtedly have passed to starboard, and a collision would have been avoided."

Here the court plainly and succinctly states that the Kern caused the disaster primarily. There

could be no findings, no conclusion or announcement by a court in its opinion more clear or unequivocable, and this was never found by the court below and if it had been found by the court below, we believe the court below would have given a decree in favor of the Elder. The opinion of this honorable court shows that the first move tending toward the disaster was that of the Kern.

The opinion then says:

> "But we are not convinced that the court below erred in holding that the proximate cause of the collision was the fault in navigation of the Elder and that the fault of the Kern was not a contributing cause."

The question arises, how could the acts of the Kern under the facts, be anything but the contributing cause of the disaster? And it is to undertake to convince the court on this point that this petition is filed.

The opinion of this honorable court then says:

> "It was the Elder's duty, on hearing the first danger signal, to proceed no further in the attempt to pass."

Is this a correct and proper statement under the circumstances? Does this statement not assume the existence of non-existent conditions and assume a state of facts not included in the evidence or the findings? Is it the holding of the court that the "Elder" "proceeded further in the attempt to pass"? Is not the contrary the fact?

The appellant is not aware that anywhere in the record is it shown or claimed that the Elder undertook to proceed in an attempt to pass. It is the appellant's understanding that Capt. Patterson undertook to stop headway as soon as he was able to comprehend the Kern's intentions. It is the appellant's understanding of the record that the pilot on the Elder, Capt. Patterson, heard the four signals, and not more than four, and knowing that the barges and the Kern were ahead and knowing that the four signals might be a quickly repeated signal to pass to port, he said, "For God's sake what were those fellows trying to do?" (Apostles, pg. 341.) and then repeated his signal to pass to starboard.

Let us stop here for a moment. Capt. Patterson heard signals from the Kern. The signals were confusing; there was no explanation for them. The court has found this fact in its opinion herein. This court has said in effect that the act of the Kern in sounding that signal, brought on the disaster, or, to be more specific if the Kern has not sounded that signal, there would have been no disaster. If it were a danger signal, Capt. Patterson dared not pass, but the danger was not visible or within his means of understanding, and as a matter of fact, there was no danger, which is the reason this honorable court decides that the Kern was to blame in that respect.

It is now submitted that the same reasons that caused the court to say that the disaster would not

have occurred except for the Kern blowing the signal, make the blowing of the second danger signal occupy the same position the law and make the blowing of the second danger signal the proximate cause of the disaster.

If the Kern had answered the second signal of the Elder as the Kern should have, there likewise would have been no disaster.

If the blowing of the first signal by the Kern makes the Kern blameworthy, the blowing of the second signal, it seems to the appellant, fastens the entire blame on the Kern.

Article 17, Rule III, of the Pilot Rules for Inland Waters, is as follows:

> "If, when steam-vessels are approaching each other, either vessel fails to understand the course or intention of the other from any cause, the vessel so in doubt shall immediately signify the same by giving several short and rapid blasts, not less than four, of the steam whistle."

This is the danger signal, so to speak. Moran, being in error, called upon the Elder by four whistles to declare herself, and Capt. Patterson, knowing the rules, answered with a signal to pass to starboard. His actions were perfect, as to both the rules and the conditions surrounding, and it was then again that Moran sounded the danger signal and the appellant contends and submits to the court that the action of Moran and the Kern in sounding

the second danger signal was the proximate cause of the disaster. Moran had no excuse for sounding the danger signal or the four blasts under Rule III., Art. 17, the second time. He should not be allowed to come into court and say he did not understand. It was his business to understand, and it was his confessed lack of understanding that caused him to blow the danger signal in the first place and his lack of understanding that caused him to blow the danger signal in the second place.

Now, if he was guilty the first time, why should he be absolved the second time? Why should the blame be thrown on the Elder?

And the appellant wishes to point out to the court that should a rehearing be granted, the appellant will be able to show that the Elder reversed within a period of time that was hardly appreciable, if the testimony of Moran, the Kern's pilot, can be relied upon.

The opinion further says:

> "By the rules of navigation the pilot of the Kern was made the judge of the necessity for giving the danger signal."

The appellant submits, however, that he is not the judge in the sense that his actions can be arbitrary. The appellant does not understand the law to be that the pilot of the Kern had legal authority to interfere with the progress of the Elder down the river without reason or excuse.

The petitioner herein sets this forth as a ground for a rehearing.

The court further says a duty was imposed upon the Elder

> "under no circumstances to attempt to pass at that point or until the Kern signified her consent."

and the petitioner respectfully follows another, or different legal rule from this, because under Rule VIII, and under the decisions, the vessel ahead "shall signify her willingness by blowing the proper signal," at such time "where it can be safely done." In other words, the petitioner begs to point out to the court that the court's holding, as indicated in the opinion, that the Kern was empowered by the law to give or withhold her consent to the Elder passing, is not well founded. The petitioner believes that the law is that the Kern is not allowed to be arbitrary or give the danger signal or the four blasts indicating a lack of understanding or do anything else to hold up a passenger ship unless the Kern gives the proper reason therefor. The court has found in this cause specifically THAT THERE WAS NO REASON FOR THE KERN'S ACTION IN GIVING THE FOUR BLASTS.

In addition to this and under the conditions above pointed out, the appellant refers the court to Article 27:

> "In obeying and construing these rules due regard shall be had to all dangers of naviga-

> tion and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger."

The rules and the law refer the court to any special circumstances which may render a departure from the rules necessary in order to avoid immediate danger.

Now, could there be a case in which special circumstances are more prominent than in this one?

The court in its decision says that the Elder is to blame.

The court does not specifically declare what the Elder's negligence is, but by inference says that it was the Elder's duty to stop, and this is what the appellant claims was done as soon as the Elder could know what was happening.

Article 27 provides for such a case as this.

The special circumstances in the cause at bar are the fact that the Kern was exchanging rock barges in the ships' channel and the pilot on the Elder was justified in demanding an absolutely clear signal from the Kern before taking action. Inasmuch as the Elder was on a course to the starboard of the Kern and perfectly safe to pass the Kern and as the pilot on the Elder knew this, when the pilot on the Elder received the misleading and erroneous danger signal consisting of four blasts, when it might have been five or over, the pilot on the Elder did not know whether he was to stop or

to go to the port of the Kern, and he immediately called for a further assurance from the Kern.

It seems to the appellant that under the rules every equity is with the Elder.

The court further says:

> "At that time and for some appreciable time thereafter it was obviously possible for the Elder to keep clear of the Kern, as it was her duty to do."

It is true a duty was imposed on the Elder and her duty was to keep clear of the Kern, but if the Elder was induced to do something by the Kern which brought her upon the Kern, is the law to charge the damages to the Elder or to the Kern? The appellant wishes to show to the court that the foregoing sentence or paragraph, when connected with the first paragraph of the court's decision above copied, makes the action of the Kern the proximate cause of the disaster. For instance,—

> "But for her (the Kern's) pilot's refusal to assent to the passing signal, the Elder would undoubtedly have passed to starboard and the collision would have been avoided. At that time and for some appreciable time thereafter it was obviously possible for the Elder to keep clear of the Kern, as it was her duty to do."

Does not this entitle the appellant to the decree? If the action of the Kern in her signals were such as to confuse the Elder to the point of inability to help herself, when the pilot followed the rules in

all respects, can it be said that the Elder was to blame?

Otherwise, in what respect are the specific rules for rivers and inland waters of value? If a pilot follows the rules and is misled by another pilot, who does not follow the rules, which is to blame?

In presenting this petition for a rehearing it is with the idea that a further argument on the law and an elucidation of the issues would bring the court to a realization of the accuracy of the appellant's contention, whereby an injustice would be remedied.

Portland, Oregon, April 20, 1918.

Respectfully submitted,

SANDERSON REED,
Proctor for Claimant.

State of Oregon,
County of Multnomah—ss.

I, Sanderson Reed, proctor for appellant and petitioner, hereby certify that in my judgment the foregoing petition for rehearing is well founded and that it is not interposed for delay.

SANDERSON REED,
Proctor for the Petitioner.